IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 442

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

CALVERT DISTILLERS CORPORATION, Respondent

and

NO. 443

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

SEAGRAM-DISTILLERS CORPORATION, Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

HARRY F. STAMBAUGH,
Special Counsel,
ROBERT E. WOODSIDE,
Attorney General,
Attorneys for the Commonwealth of Pennsylvania.

State Capitol,
Harrisburg, Pennsylvania.

INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 442

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

CALVERT DISTILLERS CORPORATION, Respondent

and

NO. 443

SCHWEGMANN BROTHERS, ET AL., Petitioners,

v.

SEAGRAM-DISTILLERS CORPORATION, Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

The Commonwealth of Pennsylvania has filed in the case of Sunbeam Corporation, a Corporation, Petitioner, versus S. A. Wentling, Respondent, October Term, 1950, No. 538, a brief as *amicus curiae* in support of the petition for a Certiorari.

It is respectfully suggested that decision herein be reserved until

(a) The petition for Certiorari in the Sunbeam case be considered, and if granted

(b) Argument before the Court is had in that case, which may properly be regarded as a companion case and considered at the same time.

STATEMENT OF THE CASE

The Pennsylvania Fair Trade Act of June 7, 1935, P. L. page 266, as amended by the Act of June 12, 1941, P. L. 128, 73 Purdon's Pennsylvania Statutes, Sections 7 and 8 (quoted in Appendix D, page 21a of petitioner's brief in the Sunbeam case) is substantially the same as the Fair Trade Act of Louisiana which is involved in the cases now at bar.

Pennsylvania has a direct and substantial interest in the questions involved in these cases.

Pennsylvania is an industrial state. Its vast production of raw materials and supply of skilled labor provide facilities for the manufacture of innumerable trade marks and valuable articles which are sold and shipped into all of the states of the union: If the construction of the Miller-Tydings amendment is limited so as not to permit the Pennsylvania Fair Trade Act to be effective on sales beyond the boundaries of the Commonwealth of Pennsylvania, its industries would not develop the quantity of production and lower cost or provide the funds for research and improving the quality of an article which are made possible by a larger volume of sales.

By far the greater portion of the trade-marked and branded articles produced in Pennsylvania are sold to purchasers in other states, which have Fair Trade laws. Ability of the Pennsylvania manufacturer to stabilize the price of his article is necessary to protect the quality and efficiency of his products and does not confer upon him a monopoly. His product is still obliged to meet the keenest competition of other manufacturers of similar articles.

ARGUMENT

In connection with the application for certiorari in the instant case, the Commonwealth of Pennsylvania requests this court to consider the brief filed by it as *amicus curiae* in *Sunbeam Corporation, Petitioner v. Wentling,* No. 538. In the latter brief the Commonwealth also adopted the brief filed by the petitioner.

In addition the Commonwealth desires to add the following:

The Louisiana Fair Trade Act Is an Act "Of That Description" Contemplated by the Miller-Tydings Act Permitting Minimum Resale Price Agreements as to Trade-Marked Goods Sold in Open Competition; and Appellees' Minimum Resale Price Contracts Were Executed Pursuant Thereto and Are Valid.

The controlling words of the Miller-Tydings amendment permit

"agreements prescribing minimum prices for resale of a commodity"

(a) bearing a trade-mark, brand or name

(b) "in free and open competition"

(c) when "*agreements of that description* are lawful as applied to intrastate transactions under any statute, law or public policy * * *"

(d) and the making of such "agreements shall not be an unfair method of competition * * *" (Italics supplied)

The proviso prohibits horizontal minimum price agreements, hence the permitted minimum price agreements must be vertical.

The key words are "agreements prescribing minimum prices for the resale of a commodity."

Agreements "of that description" are permitted provided they are vertical not horizontal.

Congress had before it the then existing forty-two state fair trade acts which provided that third parties with notice of fair trade contracts are bound by the terms thereof. Report No. 382 of the Committee on the Judiciary to the House of Representatives contains the following:

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. Second, that *third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*" (Emphasis supplied)

And this Court had said in *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 193 (1936):

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with

it, *upon every principle of fair dealing,* assent to the protective restriction, with consequent liability under Sec. 2 of the law by which such acquisition was conditioned." (Emphasis supplied).

The great objectives of the Sherman Act must be sustained to the full, but the question here is whether the Federal policy as enunciated in the Sherman Act as amended by the Miller-Tydings amendment requires the striking down of the policy of forty-five state fair trade acts, which in order to make such policy effective have enacted the provisions binding non-signers with knowledge, and also requires the striking down of innumerable fair trade agreements made pursuant to such fair trade acts, which agreements require signers not to sell except to those who agree to be bound.

There can be no doubt that the Louisiana Act complies with the requirements of the Miller-Tydings amendment. The dissent below does not question this but is merely to the effect that the Miller-Tydings Act does not authorize provisions as to non-signers with knowledge.

But the policy as to the agreements themselves being validated necessarily carries with it all means of enforcement, especially such a mere adjuvant as to binding those having knowledge.

And the Provisions of the Fair Trade Acts as to Non-Signers Are Declaratory of Existing Law. Equity Would Have Granted Relief Against Non-Signers Having Knowledge.

In the *Dr. Miles Medical* case, 220 U. S. 373, 55 L. Ed., 502, 31 S.C. 376 (1911), the defendant was a non-signer with knowledge. This Court said:

> "The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted. Angle v. Chicago, St. P. M. & O. R. Co., 151 U.S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Bitterman v. Louisville & N.R. Co., 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693."

(No wonder Congress did not think it necessary to refer to the provisions of the fair trade laws as to non-signers with knowledge.) The Court then proceeded to the decision that the contracts themselves were in restraint of trade (Lurton, J., taking no part). Justice Holmes dissented, saying:

> "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

It is apparent that the real question raised by the dissent below is whether fair trade contracts expressly authorized by forty-five fair trade statutes, the non-signer provisions of which were known to Congress and had been passed upon by this Court, which State Statutes were permitted by the Miller-Tydings amendment, are as to non-signers, contracts in restraint of trade in violation of the Sherman Act because the Miller-Tydings Act did not expressly refer to provisions as to non-signers.

There can be but one answer, that given by District Judge Frederick V. Follmer in *Sunbeam Corporation v. Wentling,* 91 F. Sup. 81 (1950).

> "Congress has spoken and the Legislature * * * has spoken and there is no doubt in my mind what was the legislative intent in the above instances."

The language and meaning of the Miller-Tydings Amendment are, without a scintilla of ambiguity or doubt, to

> "permit the public policy of States having 'fair trade acts' to operate with regard to interstate contracts for the resale of goods within those States."
>
> HR Report No. 388 of Committee on the Judiciary.

And this Court has referred in passing to the Miller-Tydings Amendment as the federal 'Fair Trade' Act:

> "Both the federal and state 'Fair Trade' Acts expressly provide that they shall not apply to price

maintenance contracts among producers, wholesalers and competitiors."

U. S. v. Frankfort Distillers, 324 U.S. 293, (1944).

Congress acquiesced in the belief that the owner of a trade-mark is entitled to protection in his good will against unfair competition from price-cutters selling not merely an article of merchandise *but a trade-marked article.* Congress approved the market-wise philosophy of the late Mr. Justice Brandeis who so cogently set forth the wrong to the trade-mark owner and to the public in price-cutting of trade-marked goods. He is thus quoted in "The Brandeis Guide to the Modern World", by Alfred Lief:

> "If a dealer is selling unknown goods or goods under his own name, he alone should set the price; but when a dealer has to use somebody else's name or brand in order to sell the goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer.
>
> "Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?

In his dissenting opinion in *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, at page 253, Mr. Justice Reed said:

> "The public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense. There are, however, statutory exceptions to such unlimited competition.[4]"

In *Appalachian Coals, Inc., v. U. S.*, 288 U. S., 344 (1933) competing producers of bituminous coal in the Appalachian area formed a corporation to act as an exclusive selling agent, with authority to set prices. The declared purpose was to eliminate destructive competition. It appeared that the great bulk of their output was marketed in another highly competitive region.

This court held that the Sherman Act was not violated, and, in its opinion, Chief Justice Hughes said:

> "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable to constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes

---

"4. E. g., Interstate Commerce Act, § 5, 49 U. S. C. §5; Communications Act of 1934, § 221, 47 U. S. C. § 221; Miller-Tydings Act, 15 U. S. C. § 1. And see Mason, The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265."

are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to egtablish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. * * * (359-360)

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The *mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.* * * *" (Emphasis ours) (360)

The Miller - Tydings Amendment, in making workable our federal system of government, is akin to the wise cooperation in the Webb-Kenyon Act (27 U.S.C.A. 122), and in Public Act 15 (15 U.S.C.A. 1011).

Under well-settled canons of construction Congress will be presumed not to have intended an absurd and illusory result.

The *Dr. Miles Medical* case had been based upon the restraint having been unreasonable at common law, hence within the policy of the Sherman Act. Congress now removes that stigma by expressly permitting such contracts when permitted by State law. There is no longer any such "common law" in force in those 45

states. The restraints of the contracts are "reasonable" in those states.

The provision as to non-signers (not referred to in either the Sherman or the Miller-Tydings Act) is merely an addendum to make the fair trade policy effective, to put into the statute the well-known equitable principle against wilfully bringing about a breach of contract by another.

Conceivably, and indeed probably, the remaining three states may adopt fair trade acts, thus making practical uniformity absolute unanimity. There would then be no common law prop anywhere in our vast domain for the *Dr. Miles Medical* decision.

Congress foresaw the other states following on after the 42 pre-Miller-Tydings Fair Trade Act states and must have intended the consequences of its own Act — a uniform fair trade state policy quite in consonance with the policy of the Robinson-Patman anti-discrimination act as tending to uniformity in treatment of customers at the consumer level.

The Sherman Act must be viewed in the light of the statutes, acts and decisions in the history of the last 40 years. And as to trade-marked goods fair-traded under fair trade acts, *Dr. Miles Medical* has been wholly superseded. That decision would not have been made with the Miller-Tydings Amendment and the State Fair Trade Acts on the books. And now there is freedom of contract to determine resale prices of one's own trade-marked and fair-traded goods and free trade across as well as within state lines.

The language of the Miller-Tydings Amendment is broad and sweeping except that horizontal agreements are not permitted. Hence, by the *maxim expressio unius exclusio alterius,* all vertical agreements are valid including subsidiary agreements to make effective the purpose of the Amendment to sustain the state public policy.

We are dealing with the federal public policy as established by Congress in the Miller-Tydings Amendment. *That* policy *is now the state fair trade policy.* That policy as embodied in state fair trade Acts is the supreme law of the land: Acts "of that description" are valid as to all vertical agreements and all provisions reasonably appropriate to the effectiveness of such agreements.

To sum up: The Louisiana Fair Trade Act fulfills the specifications of the Miller-Tydings Amendment as to resale prices of goods fair-traded under said Fair Trade Act. By the Miller-Tydings Amendment the previous federal public policy has been superseded by the state public policy. As to vertical agreements the federal public policy *pro tanto* now *is* the state public policy.

Congress knew that the state fair trade acts had provisions binding parties with notice.

This Court had upheld such a provision "upon every principle of fair dealing."

The policy as to the fair trade agreements necessarily includes all provisions reasonably appropriate to the effectiveness of resale price covenants including pro-

visions for requiring assent by the buyer and binding the buyer with knowledge.

Such provisions are merely declaratory of existing law.

The report of the Committee on the Judiciary showed the intent of "permit the public policy of States having 'fair trade acts' to operate * * *"

Congress has ordained that the owner of a trademark may be protected in his good will as against competition which is unfair according to the marketwise philosophy of Mr. Justice Brandeis and the dissent of Mr. Justice Holmes.

Congress will be presumed not to have intended an absurd and illusory result.

On the contrary, Congress may well have foreseen a uniform fair trade state policy in consonance with the policy of the Robinson-Patman Anti-discrimination Act.

The decision in the *Dr. Miles Medical* case that the resale agreements were in "restraint of trade" would not have been made with the Miller-Tydings Amendment and the state fair trade acts on the books. But that case itself recognizes that an "actionable wrong is committed" by one who induces a breach of contract; and equitable relief would have been granted but for the decision as to the infirmity of the contract itself.

Conclusion.

The Commonwealth of Pennsylvania repeats its suggestion that decision herein be deferred until after the ruling upon the petition in the Sunbeam case, and that if such petition be granted, until after argument in said Sunbeam case.

HARRY F. STAMBAUGH,
Special Counsel,

ROBERT E. WOODSIDE,
Attorney General,
Attorneys for the
Commonwealth of Pennsylvania.